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No. 97-1674

Supreme Court, U.S.
FILED
MAY 27 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

JAMES MAY, *et al.*,

Petitioners,

vs.

SHUTTLE, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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Lutz Appellate Services, inc.

14 pp

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INTRODUCTION

The decision of the lower courts in this appeal nullifies long-standing Constitutional, statutory, and common law rights and disregards judgments of the Court. If the decision is allowed to stand, it will be the infliction of punishment — the removal of employment and statutory rights targeted by the respondents — without the benefit of due process or a trial. This issue is pervasive and has been considered by the Court in at least two considerably different contexts. In *United States v. Lovett*, 328 U.S. 303, 315 (1947), the Court ruled Constitutionally invalid the removal of an employment contract against employees targeted by Congress because of their perceived political views. In *Lynch v. United States*, 292 U.S. 571 (1934), the Court ruled that it would be an unconstitutional interference with property rights guaranteed by the Fifth Amendment for Congress to remove insurance contract benefits for veterans which it authorized but later deemed too expensive in times of economic adversity. This case presents the Court with the same issue in a third context. Through the action of the lower courts, contract rights of petitioners, particularly including substantial rights afforded petitioners by Congress under the Railway Labor Act, were ruled voided because of a representation decision made by the NMB. The lower courts compounded the unconstitutional removal of petitioners' contract rights by simply not addressing the petitioners' significant, *additional* employment related rights under ERISA, 29 U.S.C. § 1001, *et seq.*, and the ADEA, 29 U.S.C. § 621, *et seq.*, as reiterated by the Court only recently in *Oubre v. Entergy Operations, Inc.*, 522 U.S. __, 118 S. Ct. __, 139 L. Ed. 2d 849 (1998) and *Inter-Modal Rail Employees Ass'n v. Atchison, T. & S. R. Co.*, 520 U.S. __, 117 S. Ct. __, 137 L. Ed. 2d 763 (1997).

THE COURT CANNOT CONSIDER RESPONDENTS' CONDUCT IN ISOLATION

There can be no dispute, referencing the record below, petitioners were targeted for removal from the outset of the USAir Shuttle because respondents readily admit this fact. Respondents contend that petitioners were too expensive to be employed by Shuttle because Shuttle was in "dire financial straits."[1] US Airways

1. This was very much in dispute. Shuttle never defaulted on its loan (Cont'd)

Opposition, at 5, 10. Petitioners alleged in their Complaint and demonstrated on the record, on the other hand, that Shuttle had a surplus of cash and that respondents joined together to remove petitioners for various reasons. Shuttle, Banks and US Airways were motivated by age and the fact that ERISA benefits were too high and escalating too fast because of age. Petition at 22-25. IAM was motivated, *inter alia*, by hostility toward the mechanics at Shuttle, whose union IAM wished to replace. Like the cause of action upheld by the Court in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), this case must be considered not in the isolation of individual events but in the context of an overall plan by the respondents acting in concert to remove petitioners from their jobs. The facts were fully set out in the record below, were plainly in dispute, but not properly considered in a summary judgment proceeding.[2]

RESPONDENTS' OPPOSITION INACCURATELY STATE THE RECORD

Offering no substantive response to petitioners' contentions, respondents misstate the record. As an example, respondents USAir and Shuttle contend that the Court should not remand this case for further proceedings in light of *Oubre v. Entergy Operations, Inc.* because petitioners make their claim only as an afterthought, a

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(Cont'd)
to the banks. In September 1993, one month before the furlough of petitioners in November 1993, Shuttle generated excess cash and profits of 1.6 million dollars and predicted the trend would continue. *See* record at B00724B and petitioners' Opening Brief before the circuit court at 37.

2. Citibank's Vice President Silverstein targeted petitioners' collective bargaining agreement just prior to the April 2, 1992 initiation of the merger representation proceeding at the NMB by the banks' hand-picked manager, USAir, as follows:

> Because of the virtual employment guaranties that were granted by Trump [respondent Shuttle. Inc.'s predecessor in interest] in the various collective bargaining agreements, labor claims create a very substantial liability for the Shuttle. [Citation to the record at] B000291. * * * A sale of the [Trump Shuttle] without labor will result in a suit by the Trump labor unions under their collective bargaining agreements for damages resulting from the breach of the non-furlough provisions. . . . [D]amages have been estimated to be quite significant and would dilute the value of the banks' recovery. [Citation to the record at] B00300.

"passing" reference in their last Reply Brief before the circuit court. US Airways, Inc. Opposition at 21. They failed to advise the Court that petitioners Barone et al. raised the 626(f) issue in a specific *motion for partial summary judgment* filed before the **district court** on September 29, 1995 and in their *Opening Brief* before the **circuit court**, on July 22, 1997. Thus, on July 22, 1997 these petitioners anticipated the Court's judgment in *Oubre* when they argued below that:

> a. As noted above, the plaintiffs who were 55 years of age and older were given the option **on the day of the layoff** to choose between the Shuttle's regular severance pay (15 weeks) or its regular early retirement plan. Plainly, the defendants followed none of the requirements of 29 U.S.C. § 626(f) in forcing these plaintiffs (Barone et al.) to make this election. The District Court accepted the defendants' assertion that the early retirement plan was an "enhanced" plan. But at the least, this was in dispute. (*See, e.g.*, [citation to the record] at A01071; A01245 [pp. 199-200].) Once again, the District Court ignored the plaintiffs' proof that § 626(f) was not followed.

[Opening] Brief for Appellants, *May et al. v. Shuttle, Inc., et al.*, Case No. 96-7233, at pages 46-47. (Emphasis in original.) The lower courts rejected petitioners' Section 626(f) claims while refusing to acknowledge the undisputed evidence of record which support those claims. This case plainly should be remanded for consideration in light of *Oubre*.

The circuit court and respondents failed to consider or dispute evidence that petitioners were replaced because of their pension and medical welfare benefits. Petition, at 21-25. In *Inter-Modal Rail Employees Ass'n*, above, the Court unanimously barred the removal of petitioners from jobs under similar circumstances. Although the Court's mandate in *Inter-Modal* was urged upon the circuit court, this Court will find no reference to *Inter-Modal* either in the lower court's decision or in respondents' Briefs in Opposition to this Petition. This case should be remanded for consideration in light of *Inter-Modal* alone.

THE RAILWAY LABOR ACT

The fundamental contract issue before the courts below failed to receive consideration. The lower courts failed to recognize two separate proceedings before the NMB and found erroneously that the single carrier proceeding requested by USAir was brought jointly by two unions (respondent IAM and the United Steelworkers) and the carrier. Petition, Appendix B, at 7a, 24a and 31a. Petitioners noted these errors in their Opening Brief before the circuit court at pages 13, 25-26. Although respondents have no choice but to concede the correct facts, their Briefs in Opposition fail to advise the Court that their current version of the facts is *not* the version accepted by the lower courts.

The omissions and errors are significant because they confuse the record, obscuring the mischief created on Shuttle by USAir's sole initiation of the merger proceeding. If this Court considers the language in *Railway Labor Executives Ass'n v. National Mediation Board*, 29 F.3d 655 (D.C. Cir.), *(en banc), as amended*, 38 F.3d 1224 (1994) ("*RLEA v. NMB*"), which the Court approved by its denial of certiorari, 514 U.S. 1032 (1995), it will observe the mischief warned against by the *en banc* court. The decision of the lower courts in this case essentially overrules *RLEA v. NMB* by allowing the NMB to entertain a representation petition brought by a carrier. The *RLEA* court's warning is now overlooked by the minority panel in *RLEA v. NMB* now sitting as the presiding panel in this case below (Judges Silberman and Williams):

> By invoking the Board's jurisdiction, a carrier could create a problem where employees saw none or thrust itself into the center of a representational fray and thus attempt to influence the outcome of any subsequent election. . . . [A] carrier could hasten an election. . . . The timing of a carrier's invocation easily might . . . constitute forbidden "interference, influence or coercion" over employees' designation of their representative. 45 U.S.C. § 152 (Third). Such a scheme does not comport with the Act or with Congress' clearly expressed intent.

RLEA v. NMB, 29 F.3d at 668. The *en banc* court determined that danger lurked when a carrier was allowed to invoke the

jurisdiction of the NMB. The warning in *RLEA v. NMB* came to fruition in the instant case.

The single carrier status petition by USAir at Shuttle was separate from the representational election for the Fleet Service Employees at USAir brought by IAM and Steelworkers. When the NMB decided to send "provisional" ballots to petitioners at Shuttle on July 10, 1992, the ballots contained only the following notice:

This will notify you of an election presently being held under the Railway Labor Act involving the following:

FLEET SERVICE EMPLOYEES

OF

USAIR, INC.

SOUGHT TO BE REPRESENTED BY:

UNITED STEELWORKERS OF AMERICA

AND

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS

AND PRESENTLY

UNREPRESENTED

Petition, Appendix K, at 69a.

An analogy may be drawn to an American Citizen receiving an unsolicited ballot to vote in a French election, and having done so loses his American citizenship. The voter can no better "vote" in a French election than could petitioners vote for representation at USAir because they were not employed by USAir. Once more ballots were sent without any explanation of their significance, noting only that the USAir employees were "UNREPRESENTED." The courts below ruled that petitioners lost their contract rights by utilizing the above quoted ballots. The ballots give no notice of possible "DISENFRANCHISEMENT". Petitioners necessarily could not *vote*, that is make an informed choice.

Confusion reigned because the NMB anticipated it would rule in favor of single carrier status and issued the ballots in anticipation of its ruling. It held the ballots when it ruled on single carrier

status one day before the election at USAir. When the ballots were issued, however, the NMB could not give petitioners warning of the significance of the ballots because it had not yet ruled on "single carrier status". As a consequence, only the NMB knew the reason for issuing the ballots to petitioners. The secret was not revealed until an Amicus Brief was later submitted. The concern at NMB was to rule on a petition by a carrier and then render a decision before ballots in the representational election at USAir were counted. Respondents were able to exploit the confusion by misrepresenting the facts and making false promises to the Petitioners of no changes and of workforce merger. *See* Petitioners' Complaint. Indeed, the lower courts confused the two proceedings. This was an impermissible transgression.

The incumbant IAM could not be removed as Petitioners' representative because application of the NMB's Merger Rules could have **"NO IMPACT OF VOLUNTARY RECOGNITION AGREEMENTS."** Moreover, no application for a representational vote was ever made at Shuttle because the IAM was already voluntarily recognized. Lacking such power, the NMB could not act to interfere with petitioners undisputed representation at Shuttle. Thus, the courts below could consider the legal effect, if any, of the NMB conduct. The courts below then made a novel decision declaring Section 6 and the status quo provisions of the Railway Labor Act inapplicable to petitioners, thereby fundamentally unsettling the law and opening the floodgates to the mischief warned of by the *en banc* court in *RLEA v. NMB*. The lower courts' further ruling that petitioners lost all of their contract and statutory rights as a result of these events was an unconstitutional interference with petitioners' property rights. *See United States v. Lovett*; *Lynch v. United States, supra.*

It is undisputed, moreover, IAM was the voluntary incumbent on Shuttle when the ballots were counted. NMB rules cover the exact situation but were not honored:

> 4) *REPRESENTATION APPLICATION FROM INCUMBENT LABOR ORGANIZATIONS*
>
> d) Incumbent organizations on the affected carriers will be allowed, absent unusual or extraordinary circumstances, sixty days from the

> above-described [merger] decision to file a representation application supported by a showing of interest of no less than 35% of the combined class.

14 NMB No. 103 p.391. Petition, Appendix G, at 55a. Thus, respondent IAM had a duty *under the RLA* to petitioners for at least 60 days after the August 10, 1992 NMB single carrier decision. Moreover, no election could be held until the Rule was followed and, in any event, nothing could be done for at least 60 days after August 10, and then only if the incumbent IAM chose to seek a special election under the Rule. Nevertheless, the lower courts ruled that representation was lost and petitioners lost their contract rights on August 11, 1992. Despite the Rule, respondents agreed to terminate union dues deduction at Shuttle immediately; and IAM immediately sent letters, on August 31, 1992, to some petitioners "regretfully" noting its withdrawal as their union because of the NMB decision — all further indications of collusion. Petitioners could not have lost an election, as respondents repeatedly assert, because the only election the NMB had the power to conduct was under Part 4 d) of the NMB's Merger Rules, which was never held. All of this was set out in petitioners' Opening Brief before the circuit court, at 29-31.

Respondents argue that petitioners had no contractual rights to lose in August 1992, only a "temporary continuation of their expired contract's terms pending negotiation under Section 6 of the RLA. 45 U.S.C. § 156." US Airways Opposition, at 16-17. The Court has held emphatically to the contrary in *The Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 150-153 (1969) that the status quo which the parties to a labor dispute are obliged to maintain under the Railway Labor Act consists of those actual, objective working conditions, "broadly conceived," out of which the dispute arose, irrespective of whether such conditions are covered in an existing collective agreement. The status quo is to be maintained "from the beginning of the major dispute through the final 30-day 'cooling off' period" while the procedures of the Act for settling disputes are exhausted. *Id.*, 396 U.S. at 152.

Four statements summarize the truth:

1. NMB was not empowered to act an the petition or USAir, Inc.

2. NMB was not empowered to remove a collective bargaining agreement or contract rights.

3. NMB was not empowered to change contract or collective bargaining rights.

4. None of the exhaustion remedies mandated by the Railway Labor Act and no election within the NMB's power to conduct took place at Shuttle.

As to the crucial question of merger of petitioners into USAir, USAirways now makes a startling admission in its Opposition at page 9. Petitioners were not merged into USAir in 1993 "because of difficulties encountered by the IAM concerning integrating the seniority of the very senior Shuttle mechanics and the resistant USAir mechanics." The simple fact is: *petitioners were not mechanics*; they were baggage handlers (ramp service workers), a separate bargaining unit. According to the respondents, petitioners were not represented by the IAM in 1993. Respondents assert that petitioners lost the August 11, 1992 representation election at USAir and became unrepresented like their USAir counterparts. This is the same election respondents contend cost the petitioners their contract rights.[3] Given this admitted fact, it is clear that respondents fill their Opposition Brief to this Court with double talk. If petitioners were employees at will in 1993, then US Airways was free to integrate the 86 petitioners into USAir's unrepresented ramp service unit, without concern for the IAM. Indeed, this admission by USAir at this late date explodes the myth of respondents' position below that they did not combine together against the petitioners throughout this entire period to remove petitioners from their jobs. USAir invoked NMB merger rules but refused to merge the petitioners. These respondents assured the NMB (and petitioners) that it "will" merge them if the Board finds a single carrier, NMB Single Carrier Decision, 19 N.M.B. 388, 406 (1992). But it had no intention of doing so. This was an accepted fact by the lower courts.

Out of this swirling jumble of false assertions, confusing and misleading representations, procedural rules ignored, *ad hoc* rules

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3. US Airways' representation to this Court that the IAM's resistance in 1993 was the reason for no merger of petitioners into USAir, Inc. also shatters respondent IAM's contention that it was not representing petitioners, at least informally, in 1993 and invalidates the lower courts' dismissal of petitioners' claims against the union, IAM, on limitations grounds (six months, beginning August 11, 1992).

adopted, and new law promulgated by the lower courts, removal of 86 petitioners' livelihoods cannot result. *This palpably unjust result and repeatedly lawless conduct cannot now be the law of the land.* To allow the lower courts' decision and the egregious facts of this case to remain intact would be to allow government and private interference with contract and statutory rights to be so onerous as to reach proportions equal to a Bill of Attainder. *United States v. Lovett, supra*, 328 U.S. at 315 (1947).

Respondent US Airways state "After August 11, 1992, Shuttle took no immediate action to change Petitioners' wages, benefits or day-to-day working conditions." Opposition, at 9. No Section 6 notices were issued to petitioners that their contract rights would be eliminated by USAir's April 2, 1992 request to remove their representative. Shuttle and the 88 petitioners observed the "status quo" provisions of the Railway Labor Act after April 2, 1992. Petitioners expected those procedures and rights to continue until they were merged into USAir, Inc. They expected it because they were told, by their union and by their employers.[4] Indeed, Shuttle President Hallcom did so in writing on October 11, 1992. The NMB single carrier decision "did not impact your status as employees of the Shuttle" which was governed by the "various contracts and working conditions" existing before August 10, 1992. Exhibit 13 to petitioners' Second Amended Complaint (A00194). Shuttle honored the seniority rights of petitioners and *all* of the terms of the collective bargaining agreement and did not repudiate the collective bargaining agreement until the November 1993 furloughs. That some work rules changed in March 1993 does not alter this fundamental fact in this case.[5] Vacations and overtime were

4. On April 23, 1992 the IAM promised petitioners in writing that:

> [5] When the NMB approves the petition for the single employer, this will put us [IAM] in a posture to sit down and negotiate a full integration agreement with USAir containing the necessary wages, hours and working conditions; [6] We have an open Section 6 Notice and wish to continue negotiating an independent agreement for our [Shuttle] Ramp Service members of the new USAir Shuttle; [8] USAir has agreed to this process that there cannot be any integration until the [NMB] makes a final determination.

Second Amended Complaint, ¶ 95 (A00489) and Exhibit 9 thereto.

5. The Court has therefore noted: "It would be virtually impossible to include (Cont'd)

granted in accordance with seniority rights. Medical and dental benefits remained the same. Even the 19 petitioners who were given the illegal waiver of severance pay for retirement on November 13, 1993 were offered benefits accorded by the collective bargaining agreement. Petitioners believed they were under the "status quo" provisions of the Railway Labor Act until they were furloughed. Second Amended Complaint, ¶¶ 83-85. Petitioners should have been notified to the contrary and been allowed to pursue their remedies under the RLA. The lower courts' decision impermissibly and unconstitutionally eliminated these rights for petitioners. Under the Railway Labor Act either a carrier or a union "shall give" written notice of an intended change in agreements "affecting" rates of pay, rules, or working conditions, and that in such case, the carrier may not unilaterally alter rates of pay, rules or working conditions until the controversy has been finally acted upon by the Mediation Board. *Detroit & Toledo Shore Line R. Co.*, 396 U.S. at n.15, 150, 153-155.

The issues are clear:

1. USAir, a carrier, petitioned the NMB requesting the NMB to invoke merger rules and declare single carries status;

2. NMB ruled single carrier status, and without any authority it counted ballots in a separate election at USAir submitted by petitioners at Shuttle before the single carrier ruling;

3. The lower courts then interpreted the NMB rulings to mean that the 86 petitioners immediately lost representation;

4. The lower courts ruled that although the merger rules had been invoked, no merger transpired;

5. Finally, the lower courts, not the NMB, ruled that petitioners lost employment rights guaranteed by the status quo provisions of the RLA and, therefore, by the United States Constitution.

CONCLUSION

The Supreme Court is now being asked to unravel the contorted facts, place legal restrictions on the improper extension of government power exerted to wrongfully remove a contract and statutory rights, and remand this case for further proceedings in accordance with this Court's recent rulings relating to petitioners' ERISA and ADEA rights.

(Cont'd)

all working conditions in a collective bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement." *Detroit and Toledo Shore Line R. Co. v. United Trans. Union*, 396 U.S. at 154-155.

Respectfully submitted,

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